



Submission to Dublin Port Company

Dublin Port Company Franchise Review Consultation Document

February 2014

S/14/04



The Competition Authority
An tÚdarás Iomaíochta

1. BACKGROUND

- 1.1 Dublin Port Company's (DPC) Franchise Review Consultation Document¹ has been prepared on the basis of submissions received by DPC during an initial consultation period from July to September 2012 and the findings and recommendations of the Competition Authority's study of competition in the Irish ports sector². The Franchise Review was put on hold pending the publication of the Authority's study.
- 1.2 The stated aim of the Franchise Review is to maximise the utilisation of land and make Dublin Port work better for port users. Dublin Port's land is utilised by a variety of mostly private sector companies on the basis of a number of types of commercial agreements. These include leases, licences, jetty agreements and, in some cases, long-standing historical arrangements which are not formalised in writing. DPC groups all such agreements as 'franchises'. Franchises are additionally taken to include possible future agreements such as concessions.
- 1.3 The Competition Authority published its study in November 2013. The Authority made two main recommendations regarding existing franchise agreements in Dublin Port – namely the leasing and licensing of Lo-Lo terminals and general stevedore licensing. The Authority found that these leases and licences may have the effect of restricting competition by severely limiting the scope for new entry. It was recommended that DPC should seriously consider reducing the duration of these agreements in order to address their anti-competitive impact. Further details are provided in Section 2 below and in the Authority's ports study.
- 1.4 The Competition Authority is broadly positive regarding the policy direction being proposed by DPC in the Franchise Review. However, while recognising the legal challenges associated with altering the existing leases and licences, the Authority feels that the Franchise Review should give a clearer signal to port users and potential port service providers that DPC is resolute in its efforts to improve intra-port competition. In particular, the Authority is concerned that the criteria under which DPC is proposing to issue new general stevedore licences are overly restrictive and protect the incumbents' position to an extent that does not seem justified either in the interests of the port or port users.
- 1.5 Section 2 summarises the findings and recommendation of the Competition Authority's ports study. Section 3 captures the content of the consultation document while Section 4 outlines the Authority's views on the consultation document.
- 1.6 The Government announced in 2012 that, in respect of recommendations made by the Competition Authority in future market studies, the Minister with responsibility for those recommendations will, within nine months of publication of the study, bring a report giving their position on the implementation of the recommendations. In this

¹ The DPC Franchise Review Consultation Document is available online from: http://www.dublinport.ie/fileadmin/user_upload/documents/Franchise_Review_Consultation_Document_-_3rd_February_2014.pdf

² The Competition Authority's study of competition in the Irish ports sector is available to download from: www.tca.ie.

case, the response will be from the Minister for Transport, Tourism and Sport.

2. THE COMPETITION AUTHORITY'S PORTS STUDY

- 2.1 The Competition Authority's ports study found that franchise agreements in Dublin Port may have the effect of restricting competition by severely limiting the scope for new entry. These concerns stem from **(a)** the leasing and licensing agreements for Lo-Lo terminal operators and **(b)** the current licensing agreements for stevedores and self-handling licences. Our findings and specific recommendations are summarised as follows.

Leasing and licensing for Lo-Lo terminal operators

- 2.2 The two terminal operators have approximately 110 years and 85 years left to run on their leases, while the third terminal operator is providing Lo-Lo services under a general stevedore licence that was granted by DPC 20 years ago containing almost-unconditional renewal clauses. This creates the possibility of repeated renewals of the licence for an indefinite number of consecutive 20 year periods. In other countries the average term for port terminal leases ranges from about 15 to 40 years.
- 2.3 The length and nature of the leases and the licences combined with the lack of cargo handling space next to the North Quay walls means the threat of entry is limited. Dublin Port's pre-eminent position for Lo-Lo cargo and the terminal operators' vertical integration with shipping companies means that in the absence of spare capacity, there is potential for the incumbent terminal operators to charge significantly more and offer an inferior level of service than would be the case in a more open competitive market. Moreover, while DPC can impose performance measures on the licensed terminal operator, it cannot do the same for the leaseholders.
- 2.4 **Recommendation 1** of the ports study states that:
- *DPC should seriously consider reducing the duration of these leases in order to address their anti-competitive effects.*
 - *For the same reason, the clause which appears to allow the repeated renewal of the licence of the third terminal operator should be amended to facilitate new entry.*
 - *Future terminal leases and licences should be awarded for shorter periods on a fair, reasonable and non-discriminatory basis and should include efficiency incentives that are enforced by DPC.*
 - *The terms and conditions of the leases and licences, including their length, should be designed in a manner that ensures effective competition and reflects the level of investment required to provide cargo handling services.*

Stevedore licensing

- 2.5 There are only two general stevedore licences currently available that allow for the direct provision of stevedore services in the common user quays on the Northside and Southside of Dublin Port where most dry bulk handling takes place. Furthermore, the location of their cranes and

warehousing means that one stevedore service provider generally provides stevedore services on the Northside while the other provides stevedore services on the Southside of the port. These companies therefore enjoy effective monopolies in their respective licensed areas.

- 2.6 The general stevedore licences were granted 20 years ago and will be renewed this year with almost-unconditional renewal clauses. This again creates the possibility of repeated renewals of the licences for an indefinite number of consecutive 20 year periods.
- 2.7 While new licences can be issued, within the context of the Competition Authority's ports study, DPC has indicated that due to space constraints, licensing multiple stevedores may not be the optimal outcome and could limit the scope for future investments in cranes and other cargo handling equipment. DPC has also requested that licence applicants must demonstrate that they can attract new business to the port.
- 2.8 The current licensing system appears overly restrictive and could be limiting competition from more efficient stevedores. If Dublin Port was to experience a spike in bulk tonnage, the incumbents could charge a higher price and offer a lower quality of service than would be the case in the presence of robust competition where there is a threat of entry.
- 2.9 **Recommendation 2** of the ports study states that:
- *At least two new general stevedore licences should be issued by Dublin Port Company – one on the Northside and one on the Southside of the port. As stated in Recommendation 1, the clause in the existing stevedore licences which appears to allow the repeated renewal of the existing stevedore licence at the licensee's option and on identical terms should be amended.*
 - *General stevedore licences should be granted to applicants on a fair, reasonable and non-discriminatory basis or through a tendering process. Specifically, licensing criteria adopted by any port authority requiring applicants to demonstrate that they will attract new business to the port should be removed.*
 - *Self-handling licences should be made available to all responsible operators on a fair, reasonable and non-discriminatory basis at a cost that does not discourage entry.*

3. DPC FRANCHISE REVIEW CONSULTATION DOCUMENT

3.1 The DPC Franchise Review Consultation Document contains five sections. Section 1 and section 2 provide some context and background to the Franchise Review while section 3 provides some commentary on the Competition Authority's ports study. Section 4 and section 5 describe the main policy issues that are being proposed by DPC as part of the Franchise Review. The key issues are outlined below.

DPC comments on the Competition Authority ports study

Leasing and licensing

3.2 DPC makes a number of comments regarding the Competition Authority's views on the licensing and leasing arrangements in the Franchise Review Consultation Document.

- DPC states that the current leasing and licensing agreements were made in the early 1990s and they *"...would not consider granting leases and licences on such terms today..."* DPC also states that *"...the renewal clauses are not appropriate by today's standards..."*³
- However, DPC notes that the leasing and licensing agreements have *"worked remarkably well"* with cargo volumes and operating profits increasing since 1990. They also state that *"...for as long as the licensed stevedores continue to invest in cargo handling equipment, attract new business and provide competitive and efficient cargo handling services, the renewal clauses are not a matter of fundamental concern..."*⁴
- DPC states that *"...the property rights enjoyed by the licensees are strong and, absent paying financial compensation, DPC's ability to undo the terms of the licences may be limited..."*⁵
- Regarding leases, DPC states that *"...the excessively long term of the lease (i.e., the Dublin Ferryport Terminals (DFT) lease) is not a matter of fundamental concern to DPC as the terminal operator has invested substantially over the years in the terminal and has grown its business considerably both to its own benefit and that of DFT..."*⁶

General observations

3.3 DPC also makes these general observations regarding the Competition Authority's study:

- The Competition Authority *"...did not indicate how problematic franchises might be addressed particularly as regards the rights the holders of these franchises have under the terms of their current binding agreements with DPC or the property rights the*

³ See paragraph 45 and 51.

⁴ See paragraph 49 and 51.

⁵ See paragraph 52.

⁶ See paragraph 55.

*holders may have acquired under the statutory provisions of landlord and tenant legislation..."*⁷

- The Competition Authority's competition concerns regarding price and service quality *"...are stated in the subjunctive..."*⁸
- DPC does not believe that *"...either price or service quality are issues of concern in either the Lo-Lo terminal market or in the bulk stevedoring market in Dublin Port at the current time..."*⁹
- Regarding the Lo-Lo terminal and bulk stevedoring markets, the Competition Authority *"...understated the extent of current and future competitive forces..."*¹⁰
- The market for cargo handling is imperfect primarily because of *"...the supply-side constraints on berth and land capacities..."* DPC must, therefore *"...operate and frame its Franchise Policy within the confines of conflicting competition, finance and planning constraints..."*¹¹
- DPC does not *"...see any merit in re-entering the craneage market..."*¹² DPC cites significant private investment, a reduction in DPC's operation costs and the large growth in port volumes as justification for this decision.

The Franchise Policy

- 3.4 The consultation document identifies 13 policy issues that are being proposed by DPC as part of the Franchise Review. Those issues specifically focused on addressing concerns outlined in the Competition Authority's ports study - namely leasing and licensing agreements - are outlined below:

DPC Proposal No. 7 - Land utilisation for containers: DPC will *"...seek to influence all container terminals to increase their utilisation of port lands towards 40,000 TEU per hectares per annum as volumes grow in future years..."*

DPC Proposal No. 8 - Line independent container terminal: DPC will *"...use whatever means may be available to ensure that there is always at least one line independent terminal in Dublin Port..."*

DPC Proposal No. 9 - Container terminal franchises: *"DPC aspires to having similar operators in the port having comparable franchises. In the case of the three container terminal operators, the terms of such franchises would ideally include:*

- *A fixed term related to the economic life of the terminal's cargo handling equipment (typically 20 to 30 years).*
- *At the end of the franchise period, there would be an open tender competition to determine whether the incumbent's*

⁷ See paragraph 62.

⁸ See paragraph 64.

⁹ See paragraph 65.

¹⁰ See paragraph 68 and 70.

¹¹ See paragraph 66 and 67.

¹² See paragraph 75.

franchise would be renewed or whether a new operator would take over the terminal's operation.

- *DPC would retain control over the free time given for containers on the terminal (full or empty, import or export) and the level of daily charges that would apply after this free time.*
- *DPC would control dwell times by decreasing free periods and increasing daily storage charges over time so as to encourage operators to move their containers through the terminal ever more quickly"*

DPC Proposal No. 10 - Additional general stevedoring licences:

"DPC sees two circumstances where it would issue new stevedoring licences, general or otherwise:

- *Firstly, where an operator made a robust business case, DPC would agree the terms of the new franchise by direct negotiation;*
- *Secondly, where market conditions clearly indicate that to issue a new licence would improve the competitiveness of the port, DPC would issue a new licence on the basis of an open tender process.*

In deciding whether or not to proceed on either basis, DPC will take into account the scarce capacity it has available for any new franchise and will seek to ensure that any decision to issue a new franchise maximises the utilisation of the port's assets"

DPC Proposal No. 11 - Self-handling licences: *"Where operators have existing long term assets for the transit storage of cargo close to quay walls, DPC will give such operators the option of taking up self-handling stevedore licences on suitable commercial terms.*

These terms will include minimum annual throughput guarantees (expressed in financial terms) plus a reasonable annual licence fee"

DPC Proposal No. 12 - Existing franchises: *"Notwithstanding the concerns which the Competition Authority has raised in respect of container terminal leases and general stevedoring licences and notwithstanding DPC's wish that some important terms of existing franchises were different, DPC will continue to honour the terms of these agreements unless they can be varied by mutual consent"*

DPC Proposal No. 13 - Data collection and performance measurement: *"DPC will commence the collation and annual publication of a series of metrics to facilitate port users and other stakeholders to make informed decisions regarding their use of Dublin Port"*

4. COMPETITION AUTHORITY VIEWS ON THE PUBLIC CONSULTATION

- 4.1 The Competition Authority welcomes this opportunity to comment on DPC's Franchise Review Consultation Document. The Authority is also pleased that DPC has sought to incorporate the findings and recommendations of our ports study.
- 4.2 The Competition Authority is broadly positive regarding the policy direction being proposed by DPC. However, while recognising the legal challenges associated with altering the existing leases and licences, the Competition Authority feels that the Franchise Review should make a clearer signal to port users and potential port service providers that DPC is resolute in its efforts to further improve intra-port competition.

A step in the right direction

- 4.3 The Competition Authority welcomes a number of the DPC proposals to improve competition within the port. These include:
- **DPC Proposal No. 8 - Ensuring there is always one line independent container terminal:** Dublin Ferryport Terminals (DFT) and Marine Terminals Limited (MTL) are vertically integrated with shipping companies which means they are guaranteed a certain level of throughput. That can limit the potential for competition between terminals and between shipping lines, particularly in the absence of spare capacity. Vertical integration has the effect of segmenting a ports Lo-Lo market by limiting the potential for shipping lines that are not vertically integrated to switch between Lo-Lo terminals¹³. This issue is exacerbated by **(a)** the growth of Vessel Sharing Arrangements (VSAs) among major Lo-Lo shipping lines and **(b)** the fact that Burke Shipping Group (BSG), while not vertically integrated, provides ships agency services to Xpress and CLdN-Cobelfret, something that could also limit the scope for movement between terminals.
 - **DPC Proposal No. 7 & No. 9 - Shortening the length of Lo-Lo terminal leases and introducing dwell-time charges to improve land efficiency:** DFT and MTL operate under exceptionally long-term leases where the port authority has no influence over efficiency levels, while BSG is operating under a 20 year licence that will be automatically renewed in 2014 for a further 20 years. The Competition Authority has recommended that future terminal leases and licences should be awarded for shorter periods on a fair, reasonable and non-discriminatory basis and should include efficiency incentives that are enforced by DPC.
 - **DPC Proposal No. 11 - Introducing more self-handling licences:** The opportunities to self-handle cargo in Dublin Port are currently extremely limited. The Competition Authority has recommended that self-handling licences should be made available to all responsible operators on a fair, reasonable and

¹³ For example, Eucon will mostly use the DFT terminal, BG Freight Line would use the MTL terminal, while shipping lines that are not vertically integrated will usually prefer to use the BSG terminal.

non-discriminatory basis at a cost that does not discourage entry. This would allow bulk importers or shipping lines to handle their own cargo in a more cost effective manner and provide them with greater bargaining power in their dealings with licensed stevedores.

- **DPC Proposal No. 13 - Commencing the collation and annual publication of port performance metrics:** The Competition Authority study highlighted the lack of data collection and port performance metrics within the Irish ports sector and has recommended that the Department of Transport, Tourism and Sport should prioritise the collection of such metrics. This would provide a clearer understanding of how competition is working in the port and guide future policy-making in the Irish ports sector.

- 4.4 If implemented properly, these proposals would contribute towards ensuring that there are appropriate levels of intra-port competition. These proposals will facilitate greater entry and exit, which is key to the promotion of effective competition. Effective intra-port competition will place greater competitive pressure on Lo-Lo terminal operators and general stevedores who currently enjoy privileged positions largely due to the length and nature of leasing and licensing agreements.

Areas of concern

- 4.5 The consultation document and the Franchise Review should make a clearer signal to port users and potential port service providers that DPC is resolute in its efforts to further improve intra-port competition in Dublin Port. Specifically, the Authority's view is that DPC should clearly acknowledge and identify:

- The full benefits of intra-port competition and how it should be maximised;
- That some of the current franchise arrangements in Dublin Port restrict intra-port competition and increase the potential for port service providers to earn monopoly profits and offer inefficient services.

- 4.6 The Competition Authority's concerns stem from comments made by DPC in the Franchise Review Consultation Document. These include assertions that:

(a) DPC: The leasing and licensing arrangements have worked well

DPC view

DPC states that the leasing and licensing arrangements have "...worked remarkably well..." with cargo volumes and operating profits increasing since 1990. DPC also states that "...neither price or service quality are issues of concern at the current time..."

Competition Authority view

Even if it were shown to be the case that the current lease and licence holders have performed adequately, no opportunity has been provided to allow for new entrants to supply port services in a cheaper or more efficient manner. That is, there is nothing to benchmark their performance against what it could have been in a more competitive environment. Considering the preeminent position of Dublin Port and the level of trade growth experienced in Ireland during the past 15 years, any Lo-Lo terminal operator or general stevedore operating in Dublin port under the same terms and conditions might have also experienced a four-fold increase in cargo volumes during this period.

(b) DPC: The length of a lease is not a matter of fundamental concern to DPC

DPC view

While DPC has aspirations to shorten the length of Lo-Lo terminal leases, regarding the DFT lease, DPC states that *"...the excessively long term of the lease is not a matter of fundamental concern to DPC as the terminal operator has invested substantially over the years in the terminal and has grown its business considerably both to its own benefit and that of DPC..."*

Competition Authority view

While recognising that lease length should allow for an adequate return on investment, this should not be DPC's only objective. It is equally important that lease length does not prevent competition thereby leading to higher prices and more inefficient services for port users. DFT has approximately 110 years to run on their lease while MTL has 85 years left to run. This is exceptionally long compared to international norms. Combined with other factors, this is very likely to create a significant barrier to entry and thus to competition.

(c) DPC: The renewal clauses for general stevedore licences are not a matter of fundamental concern to DPC

DPC view

DPC states that *"...for as long as the licensed stevedores continue to invest in cargo handling equipment, attract new business and provide competitive and efficient cargo handling services, the renewal clauses are not a matter of fundamental concern..."*

Competition Authority view

There are only two general stevedore licences currently available and these stevedore companies enjoy effective monopolies. The licences were granted 20 years ago containing almost-unconditional renewal clauses. This creates the possibility of repeated renewals of the licence for an indefinite number of consecutive 20 year periods. Like the Lo-Lo terminal

leases, these renewal clauses are creating a significant barrier to entry and are a matter of fundamental concern to the Competition Authority.

(d) DPC: There is little scope to issue new stevedoring licences

DPC view

DPC only sees two circumstances where it would issue new stevedoring licences, general or otherwise. Firstly, *"...where an operator made a robust business case"...*, and secondly, *"...where the market conditions clearly indicate that to issue a new licence would improve the competitiveness of the port..."*

Competition Authority view

DPC has indicated that it will only issue new licences where **(a)** an operator makes a robust business case or **(b)** where a new licence would improve the competitiveness of the port. The Competition Authority has questioned DPC's current licensing criteria which stipulate that licence applicants must demonstrate that they can attract new business to the port. It would be extremely difficult for a potential entrant to attract future business if they do not already have a licence. Moreover, this criterion suggests that a new entrant that seeks to attract business from an incumbent by offering cheaper or more efficient services will have their application rejected. This is not an effective form of competition and it protects the position of incumbents from potential competition. It is likely that the grant of new licences would directly improve the competitiveness of general stevedore services in Dublin Port.

(e) DPC: The market for cargo-handling is imperfect

DPC view

DPC states that *"...the market for cargo-handling is imperfect primarily because of the supply-side constraints on berth and land capacities..."* This will likely always be the case *"...as there are financial, investment and planning consent impediments to provide additional berth and land..."*

Competition Authority view

DPC has stated that the market for cargo-handling is imperfect. Therefore, it must operate and frame its Franchise Policy within the confines of conflicting competition, finance and planning constraints. While recognising these difficulties and the historical nature of the leasing and licensing arrangements, these issues should not be used to avoid the reform of problematic franchise agreements. The Competition Authority has highlighted that where there are legitimate concerns regarding planning and quay-space constraints, DPC should tender the existing stevedore licences on a five or ten year basis or examine other options such as investing in cranes and licence their use to multiple stevedores.

Concluding remarks

- 4.7 The Competition Authority is broadly positive regarding the policy direction being proposed by DPC. In particular, the Authority welcomes ambitions to ensure that there is one line independent container terminal, to introduce dwell time charges, self-handling licences and collect port performance metrics.
- 4.8 However, the Competition Authority also has some concerns. The Authority believes that the Franchise Review should give a clearer signal to port users and potential port service providers that DPC is resolute in its efforts to further improve intra-port competition in Dublin port. Specifically, DPC should clearly identify and recognise the full benefits of intra-port competition and that some of the current franchise agreements are overly restrictive and increase the potential for port service providers to earn monopoly profits and offer inefficient services. DPC should also recognise that the structure of the Lo-Lo terminal and general stevedore services is such that in the absence of spare capacity, there is a real danger that prices will increase and service quality will deteriorate.
- 4.9 The Competition Authority's concerns stem from comments made by DPC that are identified in section 3 above. DPC has aspirations to shorten and change existing franchise agreements, but yet they do not appear to consider lease length, renewal clauses or the level of price and service quality as being a cause for concern. Overall there appears to be a view from DPC that the current Lo-Lo leases and general stevedore licences have served the port adequately and there is little to be gained from disrupting the status quo.
- 4.10 DPC's view does not appear to recognise the benefits that competition can bring or fully appreciate the anti-competitive impact of the existing leasing and licensing agreements. Like any sector, entry and exit is crucial to ensure that intra-port competition is working effectively for DPC and for port users. It places competitive pressure on incumbents regarding price, efficiency and innovation. Without this competitive pressure, the potential for incumbent port service providers to earn monopoly profits and offer poor service quality increases.
- 4.11 The Competition Authority is especially concerned that the criteria under which DPC is proposing to issue new general stevedore licences are overly restrictive and protect the incumbent's position to an extent that does not seem justified either in the interests of the port or of its users. New entrants should be allowed to compete for existing business in addition to bringing new business to the port.
- 4.12 The Competition Authority hopes that DPC will adequately address these issues and fully recognise the benefits of competition within the Franchise Review.

growth

productivity

[illegible]

vigorous competition drives productivity growth, innovation and value for all consumers in the economy

economy

the economy
in
consumers
all
for
value
and
innovation
growth¹
productivity
quives
competition
algorithms
productive

www.tca.ie